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542650—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

CARTER H. HARRISON, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

v.

DURKEE FAMOUS FOODS, INC., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois, prays that a writ of certiorari issue to review that portion of the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in this case on June 1, 1943, which is adverse to the petitioner.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois (R. 426–445) is reported at 46 F. Supp. 642. The opinion of the Circuit Court of Appeals (R. 471–486) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1943 (R. 486–487). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the tax imposed by Section 602½ of the Revenue Act of 1934, upon the "first domestic processing" of certain oils, applies to the first domestic processing after the effective date of the Act of oils which had received one or more domestic processings prior to that date.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 602½. PROCESSING TAX ON CERTAIN OILS.
>
> (a) There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernal[1] oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor. There is hereby imposed (in addition to the tax imposed by the preceding sentence) a tax of 2 cents per pound, to be paid by the processor, upon the first domestic processing of

[1] So in original.

coconut oil or of any combination or mixture containing a substantial quantity of coconut oil with respect to which oil there has been no previous first domestic processing, except that the tax imposed by this sentence shall not apply when it is established, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, that such coconut oil (whether or not contained in such a combination or mixture), (A) is wholly the production of the Philippine Islands or any other possession of the United States, or (B) was produced wholly from materials the growth or production of the Philippine Islands or any other possession of the United States, or (C) was brought into the United States on or before the 30th day after the date of the enactment of this Act or produced from materials brought into the United States on or before the 30th day after the date of enactment of this Act, or (D) was purchased under a bona fide contract entered into prior to April 26, 1934, or produced from materials purchased under a bona fide contract entered into prior to April 26, 1934. All taxes collected under this section with respect to coconut oil wholly of Philippine production or produced from materials wholly of Philippine growth or production, shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be

paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection. For the purposes of this section the term "first domestic processing" means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

* * * * *

Treasury Regulations 48 (1934 Ed.):

ART. 1 (as amended by T. D. 4695, XV-2 Cum. Bull. 324 (1936).) *Definitions.*—When used in these regulations, the term—

* * * * *

(*n*) *First domestic processing* means the first use in the United States on or after the effective date of the Act. At all times in these regulations, the term *processing* or *first domestic processing* will be deemed to be synonymous with "use" or "first use in the United States on or after the effective date," respectively * * *.

STATEMENT

On May 10, 1934, the effective date of the Revenue Act of 1934, *supra,* the taxpayer, Durkee Famous Foods, Inc., had on hand 2,563,303 pounds of coconut oil, sunflower oil, and sesame oil which had already received one or more domestic processings. Between May 10, 1934, and December 1,

1935, the taxpayer further processed these oils and, as required by the Regulations, paid taxes in the aggregate amount of $76,899.09 upon such further processing. (R. 296–297.) The taxpayer filed a timely claim for refund, contending that the "first domestic processing" referred to in the statute had already occurred prior to May 10, 1934, and that no tax properly attached to the further processing of the oils subsequent to that date (R. 7–10, 297). Upon rejection of the claim for refund (R. 297), suit was brought for recovery of the taxes (R. 2–13). The District Court held for the taxpayer (R. 440–445), and the Circuit Court of Appeals for the Seventh Circuit affirmed, one judge dissenting (R. 471–486).

REASONS FOR GRANTING THE WRIT

This case presents the same question of statutory construction as that involved in *Colgate-Palmolive-Peet Co.* v. *United States,* Nos. 38–39, present Term, in which certiorari was granted on June 14, 1943. In the *Colgate* cases the Circuit Court of Appeals for the Third Circuit sustained the Government's position (130 F. 2d 913) and on May 24, 1943, this Court denied the Colgate Company's petition for certiorari. Following the contrary decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case, on June 1, 1943,[2] the Colgate Company asked for re-

[2] Prior to this decision the Government's position had been sustained in *Loose-Wiles Biscuit Co.* v. *Rasquin*, 95 F. 2d 438

consideration of its petition for certiorari on the basis of the supervening conflict. This Court then granted the petition. In these circumstances, a writ of certiorari should likewise be granted to review the judgment of the Circuit Court of Appeals in the instant case.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

AUGUST 1943.

(C. C. A. 2d), certiorari denied, 305 U. S. 611, and in *Tasty Baking Co.* v. *United States*, 38 F. Supp. 844 (C. Cls.), certiorari denied, 314 U. S. 654, as well as in the *Colgate* cases, *supra*.

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